

Issue: Qualification/Compensation/Leave-Involuntary charging of leave; Ruling date: June 17, 2003; Ruling #2003-054; Agency: Department of Juvenile Justice; Outcome: qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2003-054
June 17, 2003

The grievant has requested on ruling on whether her September 16, 2002 grievance with the Department of Juvenile Justice (DJJ) qualifies for a hearing. The grievant claims that DJJ misapplied policy by changing her use of sick leave to compensatory, annual, or overtime leave, and by changing her use of compensatory leave to annual leave. The grievant further claims that these practices violate the Fair Labor Standards Act (FLSA). For the following reasons, this grievance is qualified for hearing.

FACTS

The grievant is a Juvenile Corrections Officer Senior with DJJ. The grievant claims that since April 23, 2000, the agency's payroll department has charged her time off for illness to compensatory, overtime, or annual leave rather than to sick leave, causing her to lose leave balances at the end of each year. Specifically, the grievant asserts that the result of this practice is that at the end of the year, her sick leave balances are high, and do not carry over to the next year.

The agency acknowledges that it uses compensatory and overtime leave to adjust employee schedules, and asserts that nothing in policy prohibits them from doing so.¹ DJJ claims that this "schedule adjustment" practice is not a violation of policy and is a "means to contain overtime costs."² It states that the practice simply "substitutes" one form of paid leave for another, so employees are still able to miss work due to illness and be paid.

DISCUSSION

¹ According to the agency, this practice entails taking annual or sick leave taken by employees during the twenty-eight day cycle, returning it to employee leave balances, and replacing it with compensatory or overtime leave earned during the cycle.

² See Qualification Decision. During this Department's investigation, DJJ's Human Resources office indicated that schedule adjustments are used to avoid the monetary payment of overtime.

All claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, and the transfer, reassignment, or scheduling of employees within the agency generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied.³ The grievant contends that the agency misapplied or unfairly applied policy by charging time off for illness as compensatory, overtime, or annual leave, rather than sick leave. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

The grievant is covered by the Virginia Sickness and Disability Program (VSDP).⁴ Under this program, an employee may use sick leave "for absences due to personal illness, injury or pregnancy and for doctor visits."⁵ Furthermore, employees may use up to 33% of their sick leave for immediate family illnesses.⁶ The VSDP Handbook further states that any sick leave that is not used at the end of the calendar year "may not be carried over . . . to the next, nor will [employees] be paid for any unused sick leave when [they] terminate employment."⁷

Compensatory leave, on the other hand, "is paid time off for an eligible employee's having worked additional hours in a workweek; having worked on an official office closing day, a holiday, or a scheduled day off; or when a holiday falls on an employee's scheduled day off."⁸ Employees may use compensatory leave "to provide paid time off from work *for any purpose*."⁹ Finally, policy provides that when an employee leaves state service or transfers to another state agency, she shall be paid for any unused, accrued compensatory leave.¹⁰

Unlike compensatory leave, which accrues on an hour-for-hour basis, overtime leave awards one and one-half hours of leave for every hour worked over 40 in a workweek.¹¹ Like compensatory leave, overtime leave may be used for any purpose and

³ Va. Code § 2.2-3004(A) and (C); Grievance Procedure Manual § 4.1(b) and (c), pages 10-11.

⁴ The Commonwealth employs two sick leave programs. Employees hired on or after January 1, 1999 are automatically enrolled into VSDP. *See* Department of Human Resource Management (DHRM) Policy 4.57; *see also* VSDP Handbook, page 4. The other program, traditional sick leave, is described in DHRM Policy 4.55, and covers employees hired prior to January 1, 1999. The grievant has been employed by the Commonwealth for nearly thirteen years, but has opted-in to VSDP. *See* VSDP Handbook, page 4.

⁵ VSDP Handbook, "Sick Leave," page 5.

⁶ *Id.*

⁷ *Id.*

⁸ DHRM Policy 3.10(III)(A).

⁹ DHRM Policy 3.10(III)(B)(emphasis added).

¹⁰ DHRM Policy 3.10(VIII)(A)(1).

¹¹ DHRM Policy 3.15(III)(A). An employee earns compensatory leave when she works 40 hours or less in a workweek, while overtime leave is earned when she works more than 40 hours. *See* DHRM Policy 3.10 and DHRM Policy 3.15.

any unused overtime leave is paid out to an employee upon his separation or transfer from the agency.¹²

Like compensatory and overtime leave, annual leave may be used for “vacations and for other personal purposes.”¹³ Annual leave accrues at the end of each pay period, at a rate determined by an employee’s years of service with the Commonwealth.¹⁴ Moreover, unused annual leave carries over from one calendar year to the next and is paid out to an employee when he leaves state service.¹⁵

The agency contends that policy allows agencies to schedule overtime and compensatory leave for its employees. DHRM Policy 4.30 does state that “compensatory and overtime leave may be scheduled by the agency at a time convenient to agency operations.”¹⁶ DHRM has sanctioned the practice of setting work schedules to avoid the payment of overtime, but distinguishes the practice of adjusting an employee’s sick leave to another form of leave *after* the leave has been taken.¹⁷ In this case, the grievant is challenging the latter practice.

Nothing in state law or policy expressly prohibits an agency from unilaterally changing an employee’s use of sick leave to compensatory, overtime, or annual leave. Nevertheless, it appears that this practice may constitute a misapplication or unfair application of the Commonwealth’s leave policies.¹⁸ During this Department’s investigation, DHRM noted that sick leave “is the most restricted kind of leave” and may be used *only* for illness or doctor visits.¹⁹ On the other hand, compensatory, overtime, and annual leave may be used for *any* purpose, including vacations and personal days. Therefore, the agency’s practice of requiring an employee to use compensatory, overtime, or annual leave for illness or doctor visits causes the employee to lose the flexibility associated with other forms of leave.²⁰

Moreover, DJJ’s practice results in high sick leave balances and low compensatory, overtime, and annual leave balances. When an employee separates or transfers from the agency, policy requires that the agency pay employees for any unused accrued compensatory, overtime, and annual hours in a lump sum payment, while the employee “loses” any unused sick leave upon separation.²¹ If employees are permitted to use sick leave, as requested, their compensatory, overtime, and annual leave balances are higher at the time of separation and their lump sum payment is higher. On the other

¹² DHRM Policy 3.15

¹³ DHRM Policy 4.10 (II)(A).

¹⁴ DHRM Policy 4.10 (III)(A)(1).

¹⁵ DHRM Policy 4.10(IV)(A) and (V)(A). Unlike annual leave, annual leave, compensatory leave does not carry over year to year, but expires 12 months after the date it is earned. *See* DHRM Policy 3.10(IV)(B). Overtime leave does not lapse, but caps at 240 hours. *See* DHRM Policy 3.15 (III)(D).

¹⁶ DHRM Policy 4.30(III)(C)(1).

¹⁷ *See* DHRM Policy Interpretation, issued May 2, 2003, by DHRM Director of Compensation and Policy.

¹⁸ *See* DHRM Policy Interpretation, issued May 2, 2003, by DHRM Director of Compensation and Policy.

¹⁹ DHRM Policy Interpretation, issued May 2, 2003, by DHRM Director of Compensation and Policy.

²⁰ *Id.*

²¹ *See* DHRM Policy 3.10, DHRM Policy 3.15, DHRM Policy 4.10, and VSDP Handbook, page 5.

hand, if their time off for illness is charged to compensatory, overtime, or annual leave, their leave balances are lower at the time of separation, resulting in a lower lump sum payment.

In light of all the above, this grievance raises a sufficient question as to whether the agency's charging of sick leave to overtime, compensatory, or annual leave constitutes a misapplication or unfair application of policy.²² As such, this issue qualifies for hearing.

The grievant is requesting compensation for time lost due to schedule adjustments dating back to March 2000. In grievances challenging ongoing agency practices, this Department has limited any relief to the 30-calendar day period immediately preceding the grievance initiation date.²³ In this case, the grievant initiated her grievance on September 16, 2002. Therefore, the grievant's relief, if any, from a hearing officer could extend no further back than August 17, 2002.²⁴

Additional Claims

The grievant further argues that any unilateral change to an employee's leave records violates the Fair Labor Standards Act (FLSA).²⁵ The Commonwealth's leave policies were explicitly drafted to comply with the Fair Labor Standards Act.²⁶ Thus, the grievant's allegation that DJJ improperly adjusts employee schedules not only asserts a violation of the FLSA but also violations of the Commonwealth's leave policies.

The General Assembly has limited the types of issues that may be qualified for hearing. While the grievance statute provides that claims of policy misapplication could qualify for a hearing, that statute does not specify that alleged violations of the FLSA could also warrant a hearing under the state employee grievance procedure.²⁷ Thus, for

²² DHRM's Policy Interpretation states that, while agencies have the right to manage employee schedules, it "is not appropriate for the agency to [change sick leave to another form of leave] without the employee's agreement." DHRM Policy Interpretation, issued May 2, 2003, by DHRM Director of Compensation and Policy.

²³ *Cf. Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994) (in context of a Title VII or Equal Pay Act violation, relief is available only for the designated statutory time) with Va. Code § 2.2-3003(C) (the designated statute of limitations period for filing a grievances is 30 calendar days). *See* Department of Employment Dispute Resolution (EDR) Ruling 2000-144; 2002-103.

²⁴ It appears that in the 30 days prior to the filing of the grievance, DJJ did not adjust the grievant's schedule. However, the agency has adjusted the grievant's schedule using compensatory leave since the filing of the grievance on September 16.

²⁵ 29 U.S.C.S. § 201 et seq. The FLSA requires that nonexempt employees be paid time and a half for work over forty hours a week. *Id.* at § 207(a)(1). Moreover, in lieu of overtime pay, employers may allow compensatory leave. *Id.* at § 207(o).

²⁶ *See* DHRM Policies 3.10 and 3.15, which are premised on the proper classification of employees as either exempt or non-exempt under the FLSA. Under these policies, employees receive compensatory leave at an hour-for-hour rate when they work *40 hours or less* in a workweek, while employees earn overtime leave at a rate of one and one-half hours of leave for every hour worked *over 40* in a workweek.

²⁷ *See* Va. Code § 2.2-3004 (A).

qualification purposes, the grievant's claim will be treated solely as a claim that DJJ misapplied the state leave policies.

The grievant has advanced an additional claim - that management has also changed her use of compensatory leave to annual leave. Because the issue of unfair application of policy, with regard to compensatory and sick leave, qualifies for a hearing, this Department deems it appropriate to send this ancillary issue for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

CONCLUSION

For the reasons discussed above, this Department qualifies the September 16, 2002 grievance for a hearing. This qualification ruling in no way determines that the agency's schedule adjusting practice is a misapplication or unfair application of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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